BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE:	)	
	)	
J. V.	)	04-49
	)	
V.	)	Thomas Jay Martin, Jr.
	)	Administrative Law Judge
METROPOLITAN NASHVILLE	)	
PUBLIC SCHOOLS	)	

THIS HEARING WAS CONDUCTED ON NOVEMBER 4, 2004.

FINAL ORDER

FACTS

The subject of this hearing is a four year old student (date of birth 4-5-2000) who is mildly mentally retarded and suffers from Downs Syndrome. Prior to attending Blakemore Child Care Center in August 2003 in Nashville, Tennessee the child was involved in the First Steps program. The child was not toilet trained prior to his admission at Blakemore in August 2003. The child began the 2003-2004 school year in diapers and, according to his mother, was not interested in toilet training until after he began attending Blakemore.

While at Blakemore the child began to show interest in using the toilet. Toilet training continued throughout the 2003-2004 year and he began using the "potty" independently at home beginning in October 2003. As the school year developed the toilet related IEP goals and objectives were changed by the M-Team as the child made

toilet training progress throughout the year. The student began wearing big boy pants to school in December 2003.

The school district and Blakemore have enjoyed a contractual relationship for several years. Blakemore has provided educational services to preschool students placed there by the district. Sometime in the summer of 2003 the district terminated the contractual relationship with Blakemore for reasons not revealed to this tribunal or relevant to this matter. Thereafter, the district proposed to move the child to the First Baptist Church Child Care Center for the 2004-2005 school year and refused to pay for services for the child at Blakemore. The child's parents not satisfied with moving their child to the proposed placement at First Baptist, filed a request for a due process hearing. The Individuals with Disabilities Education Act applies. The Petitioner waived the 45 day rule.

WITNESSES

The petitioner provided testimony from the child's mother [redacted], the Blakemore Child Care Center Director Bonnie Spears, Tennessee State University Professor of Education Dr. Beth Quick, and the child's teacher Geraldine Reynolds. The school district called witnesses including First Baptist Church Child Care Director Sandra Gentry, and employees Shirlene Harbert, Kelly Litton, LeeAnn Bomboy and Kathy Pire Benton. All witnesses were credible. The court gives greater weight to the testimony of occupational therapist Kathy Pire Benton, who testified that using peer modeling to toilet

train a child with Downs Syndrome is inappropriate at school. She said that peer modeling to toilet train is acceptable at home.

Issue #1

Does the child require the daily use of multiple toilets and peer modeling in order to become toilet trained in order to fulfill the goals in his Individual Education Plan? No. As set out above the child did not begin toilet training until he began attending Blakemore in August 2003. By October he was using the toilet at home and by December 2003 was wearing big boy underwear and pants on a daily basis. While there were slight differences in the testimony of the witnesses regarding the child's current level of toilet training development. the Court considers the testimony of Geraldine Reynolds to be the most credible. Ms. Reynolds, who is the child's teacher, said that the child pulls his pants down. sits on the toilet, urinates. pulls his pants up and washes his hands independently. According to Ms. Reynolds, he does not wipe himself after a bowel movement. It is unclear if the child's physical or mental disabilities prevent him from wiping after a bowel movement.

Occupational therapist Kathy Pire Benton was an impressive witness for the school district. She testified that it was inappropriate for a Downs Syndrome child to toilet train via peer modeling. She provided several relevant articles that were entered as collective exhibit #6 and read subsequent to the hearing by the administrative law judge.

Ms. Benton testified that it is inappropriate to toilet train a four year old Downs Syndrome child with other children because kindergarten and school age children privately use toilet facilities. Further, Downs Syndrome children have difficulty recognizing the difference between appropriate and inappropriate behaviors due to their cognitive deficiency.

It appears that the child has made significant toilet training progress but is not totally independent. Sandra Gentry, First Baptist Child Care Center Director, testified that the child's Individual Education Plan, including the toilet related goals and objectives could be implemented at the First Baptist Church Child Care Center. She was a credible witness.

Considering the child's significant toilet training progress and that peer modeling to toilet train while using multiple toilets is probably inappropriate at school, the Court is of the opinion that peer modeling is not necessary to complete the child's toilet training.

Issue #2

Is the placement proposed by the school district at First Baptist Church Child Care Center appropriate for this four year old child with Downs Syndrome who may suffer regression if moved from the Blakemore Child Care Center to First Baptist Child Care Center?

Except for the testimony of Dr. Quick, the remaining witnesses familiar with the First Baptist Church Child Care Center testified that the placement is appropriate. The district employees along with First Baptist Director Sandra Gentry, testified that there were appropriate educational opportunities and the Individual Education Plan could be implemented at First Baptist.

Considering the child is only 4 years 7 months he has just begun to receive benefit from the IDEA entitlement. Further, due to his limited cognitive ability it will not be difficult to implement the child's IEP. The Court agrees with the majority of the witnesses that the program at First Baptist is appropriate. This is not to say that the program at Blakemore is not appropriate or that the IEP could not be implemented at Blakemore. The Court is of the opinion that the child's IEP can be easily carried out at First Baptist along with many other preschool sites.

The school district is obligated to provide the child with a free and appropriate education. The First Baptist program meets that requirement.

Witnesses have voiced differences of opinion as to whether or not a preschool Downs Syndrome child should transfer schools before Kindergarten. That issue is immaterial here, unless it can be shown that the child would suffer regression. Dr. Beth Quick, testifying as an expert witness for the petitioner, opined that the child would suffer in his toilet training if he changed from Blakemore to First Baptist. The district

employees testified that the child might suffer regression for a short period of time but that he would adjust quickly and continue his progress in toilet training and other areas.

Petitioner relies heavily on a February 24, 2004 letter written by Lee Ann Bomboy that is included on page 13 of the exhibit notebook. Mrs. Bomboy explained that the letter was to secure extended school year services for the child. Apparently, the child's toilet training progress was set back during the 2003 Christmas vacation. Mrs. Bomboy also testified that there was discussion as to the preferred location for extended school year services. Since the 2003-2004 ESYS would only be of a three week duration. she was of the opinion that the child would be better served at Blakemore because that is where he attended during the school year. She also said that she wasn't worried about regression if the child attends First Baptist. Further, she testified that the child's adjustment problem was primarily a difficulty in adjusting from his mother to the school environment.

The Court is not persuaded or convinced that regression would occur if the child begins attending First Baptist. In the beginning the student might have difficulty adjusting to a new environment. Generally, children, even those with Downs Syndrome, are resilient and adjust to change. Petitioner has not carried the burden of proof that the child will regress if his placement is changed from Blakemore to First Baptist.

CONCLUSION

This Downs Syndrome child began his IDEA entitlement at the Blakemore Child Care Center as a student with the Metropolitan – Davidson County school district. The child made significant progress while at Blakemore. The child's parents would like their child to remain at Blakemore. The school district discontinued their relationship with Blakemore after the 2003-2004 school year but prior to the beginning of the 2004-2005 school year.

The parents are concerned that the child will not continue to develop if he moves from Blakemore. The proof submitted at the November 4, 2004 hearing does not support that conclusion beyond a preponderance of the evidence.

The school district is not obligated to provide the school or program that a parent chooses. The district is obligated. pursuant to IDEA, to provide an appropriate program that can deliver a meaningful educational opportunity through the child's individual educational plan. The nature of the child's disability, age of the child, the child's school friends, and the parent's wishes do not require a district to provide educational opportunity at a particular location.

In *Wagner v. Board of Education of Montgomery County* No. CIV. A. DKC 2002-0763 CIV. A. 2003-0255 (2004), the federal district court set out the case law applicable to this matter.

> "The FAPE guaranteed by the IDEA must provide a disabled child with meaningful access to the educational process. *See Board of Educ. Of the Henrick Hudson Cent. Sch. Dist. V. Rowley, 458 U. S. 176, 192, 102 S. Ct. 3034, 73 L. Ed.2d 690 (1982).* The FAPE must be reasonably calculated to confer "some educational benefit" on the disabled child. *Id.* At 207. The benefit must also be provided in the least restrictive environment ("LRE") appropriate to the child's needs, with the disabled child participating to the "maximum extent appropriate" in the same activities as his or her non-disabled peers. 20 U. S. C. & 1412 (a) (5) (A); see also 34 C. F. R. & 300.550. The IDEA does not require that a school district provide a disabled child with the best possible education, *Rowley*, 458 U. S. at 192. or that the education maximize each child's potential . *see Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). The benefit conferred, however, must amount to more than trivial progress. *See Reusch v. Fountain*, 872 F. Supp. 1421, 1425, (D. Md. 1994) (*Rowley's* " 'some educational benefit' prong will not be met by the provision of de minimis, trivial learning opportunities.")(citing *Hall v. Vance County Bd. of Educ.*, 774 F02d 629, 635 (4th cir. 1985).
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> When a FAPE is not provided to a disabled student, the student's parent may place the child in a private school and then seek tuition reimbursement from the state. *See Sch. Comm. of Burlington v. Dep't of Ed.* 471 U. S. 329, 369-40, 105, S. Ct. 1996, 85 L. Ed. 2d 385 (1985). The parent will recover if (1) the placement proposed by the state was inadequate to offer the child a FAPE, and (2) the private education services obtained by the parents were appropriate to the child's needs. *Id.* at 370."

The district here has provided a free and appropriate educational opportunity that offers benefit to this child.

In the Kentucky case of *Kenton Court School District v. Jeffrey Hunt,* 384 F.3d 269 (2004) the Court said:

"the key substantive term of *278 'free appropriate public education' in the Act is defined in 'general and somewhat imprecise' terms." Cordrey v. Euckert, 917 F. 2d 1460, 1470 (6th Cir. 1990) (citing Bd. of Educ. v. Rowley, 458 U. S. 176, 205, 102, S. Ct. 3034, 73 L. Ed. 2d 690 (1982). According to the Supreme Court, FAPE " consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Rowley, 458 U. S. at 201, 102 S.Ct. 3034.

... "an appropriate education is not synonymous with the best possible education... It is also not education which enables a child to achieve his full potential; even the best public schools lack the resources to enable every child to achieve his full potential." Cordrey, 917 F.2d at 1474.

The eastern Tennessee district court in Deal v. Hamilton County Board of Education. 259 F.Supp.2d 687 (2003) explains FAPE.

"The purpose of the IDEA is to guarantee children with disabilities access to a free appropriate public education ("FAPE")." 20 U. S. C. & 1400 (d) (1); See N. L. ex rel. Mrs. C. v. Knox County Schools, 315 F.3d 688, 689 (6th Cir. 2003); Burliovich v. Board of Educ. of Lincoln, 208 F.3d 560, 565 (6th Cir. 2000). FAPE is defined in 20 U S. C. 7 10401 (8) as meaning special education and related services that are (a) are provided at public expense, under public supervision and direction, without charge; (b) meet the standards of the State educational agency; (c) include an "appropriate" preschool, elementary, or secondary school education in the State involved: and (d) are provided in conformity with the individual education program required under 20 U. S. C. & 1414 (d)....

... are entitled to such retroactive reimbursement only if a federal court determines both (1) that the disabled child's placement by the school district violated the IDEA (i.e. that the child was deprived of FAPE), and (2) that the private placement selected by the parents was appropriate. Florence County School Dist. Four v. Carter, 510 U. S. 7,

15, 114, S.Ct. 361, 126, L. Ed. 2d 284 (1993) ; *Knable*, 238 F.3d at 763, 770; *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 184 (6th Cir. (1996). Parents who unilaterally remove their child from public school contrary to the then- current IEP, and prior to completion of the IDEA review process, do so at their own financial risk. *Florence County*, 510 U. S. at 15, 114 S.Ct. 361; *Burlington* 471 s. s. at 373-74, 105 S.Ct. 1996; *Knable*, 238 F.3d at 763; Wise, 80 F.3d at 184; *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 460-61 (6th Cir. 1993). The Deals bear the burden of proof by a preponderance of the evidence that the IEPS developed for Zachary failed to provide him with a FAPE. *Knable* 238 F.3d at 768; *Tullahoma City Schools*, 9 F.3d at 458. If they do not meet this burden, the Deals are not entitled to reimbursement for the costs incurred by their educating Zachary privately. *Burilovich*, 208 F.3d at 572.

20 U. S. C. & 1415 (i) (2) (B) (iii) provides that the Court. "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." Plaintiffs bear the burden of providing by a preponderance of the evidence that the IEP devised by HCDE for Zachary was inappropriate and failed to provide Zachary with FAPE. *Knable*, 238 F.3d at 768; *Dong v. Board of Educ. of Rochester Community Schools*, 197 F.3d 793, 799-800 (6th Cir 1999); *Renner v. Board of Educ. of Pub. Schools of City of Ann Arbor*, 185 F.3d 635, 642 (6th Cir. 1999); *Tullahoma City Schools*, 9 F.3d at 458; *Cordrey v. Euckert*, 917 F.29 1460, 1469 (6th Cir. 1990).

The evidence preponderates in favor of the school district. Therefore, both issues are decided in favor of the school district.

IT IS SO ORDERED.

ENTERED THIS THE 16 DAY OF NOVEMBER 2004.

THOMAS JAY MARTIN, JR. #13877
Administrative Law Judge
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Final Order has been placed in the U. S. Mail postage pre-paid to Ms. Mary E. Johnston, 204 Metropolitan Courthouse, Nashville, TN 37201, and Ms. Suzanne Michelle, Blackburn & McCune, PLLC, 201 Fourth Avenue North, Suite 1700, Nashville, TN 37219 on this 16 day of November 2004.

Thomas Jay Martin, Jr.